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No. 00-1462

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

—v.—

THE BANK OF NEW YORK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

In a proceeding to examine an accounting submitted by the Petitioner with respect to her actions as preliminary executor of her father's estate prior to her removal for gross mismanagement of estate assets, self dealing and willful refusal to obey court orders, the Surrogate appointed a referee to hear and report on the factual issues. After reviewing the report of the referee, the Surrogate surcharged the Petitioner for various items and ordered that certain attorney's fees incurred by other beneficiaries of the estate be paid out of the Petitioner's share of the estate. The Surrogate stated that this was appropriate since the services of such attorneys enhanced the estate and brought about the removal of the Petitioner, and were necessitated by the Petitioner's breach of her fiduciary duties. Having exhausted her appeals in the state courts, Petitioner now seeks a Writ of Certiorari in the United States Supreme Court. Her Petition should be denied for the reasons set forth below.

Petitioner failed to raise any federal questions in the court of first instance. For this reason, these issues were not properly preserved for review by the state appellate courts or by this Court. Moreover, even if the issues had been properly preserved, they do not present substantial federal questions.

The Petitioner's insistence that a referee cannot constitutionally be appointed to report to the court on complicated questions of fact unless all parties consent is based upon the legislative history of a statutory section other than the one actually relied upon by the Surrogate in appointing the referee, and is contrary to applicable case law. Her allegation that the referee was improperly paid ignores the fact that the interim fee was fixed by the Surrogate after a motion made on notice to all parties, including the Petitioner, was not opposed. The assertion

that the Petitioner was denied the right to have her own private stenographer transcribe the proceedings is not relevant because she does not allege that she was prejudiced by the mechanical system used. (Petitioner also alleges that the use of the mechanical system was contrary to law, based upon a statute that was not enacted until after the hearing in this matter had been concluded.)

Finally, Petitioner's contention that the surcharges imposed by the Surrogate were not appropriate is contrary to the weight of authority. The litigation for which the surcharges were imposed was required solely because of her malfeasance, and the services of the attorneys for the other beneficiaries enhanced the estate and led to the removal of the Petitioner. Under those circumstances, it is only appropriate for the cost of the litigation to be borne by the Petitioner.

PETITIONER HAS NOT PROPERLY RAISED ANY SUBSTANTIAL FEDERAL QUESTIONS

The instant Petition is procedurally defective because it does not establish that the federal issues sought to be presented to this Honorable Court were timely and properly raised during the course of the state proceedings. To her credit, the Petitioner does not claim that any of the purported federal questions were specifically raised in the court of first instance, the Surrogate's Court for the County of New York. Instead, she asserts that they were all raised, for the first time, on appeal.[1] However, under New York Civil Practice Law and Rules ("CPLR") §5501, the scope of appellate review in state courts is generally limited to matters raised in the trial court. In his treatise, *New York Practice*, 2d Ed., §530, p.831, Professor Siegel states that:

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[1] Petition, pp. 52a-57a.

> "There is a broad and general rule that the court will not review on appeal any points not raised in the court below, and this is a salutary provision designed to avoid waste. Its principal rationale is that if the matter had been duly raised below, it might have prevailed there and an appeal been spared." (Footnote omitted)

Since the issues which Petitioner seeks to raise here were not properly raised in nisi prius, they were not properly preserved for review by the appellate courts of New York, and hence may not appropriately be asserted before this Court.

Even if the issues had been preserved for consideration by this Court, they certainly would not present federal questions important enough to provide a compelling reason to grant a writ of certiorari. Moreover, Rule 14(g)(i) of the Rules of the Supreme Court of the United States requires that the Petition for Writ of Certiorari include specific information as to the method and manner of raising the federal questions and the way in which they were passed on by the courts below, with "pertinent quotations of specific portions of the record or summary thereof . . . so as to show that the federal question was timely and properly raised. . . ." Here, Petitioner has furnished no quotations from any part of the record, and many of the Petitioner's references to the Appendix filed in the appellate courts of New York appear to have nothing whatever to do with the points for which they are cited as support. Indeed, Petitioner has assiduously avoided providing any of the specific information called for in the Rules, apparently because it would reveal that there is no proper basis for the Petition.

THERE ARE NO CONSTITUTIONAL DEFECTS IN SCPA §506 OR WITH THE APPOINTMENT OR PERFORMANCE OF THE REFEREE

Here, the Petitioner has attempted to distort the record by re-casting uncompelling state issues into federal questions worthy of review by certiorari. The attempt should be rejected. For example, Petitioner questions the constitutionality of New York Surrogate's Court Procedure Act ("SCPA") §506, either as written or as applied, pointing to the legislative history as justification for her assertion that the appointment of a referee without the consent of all litigants is contrary to the provisions of the statute.

In fact, the legislative history to which Petitioner refers applies only to subsection 506(6), which was added in 1971 to allow the Surrogate to appoint court personnel as referees to take testimony and report to the court under certain specific circumstances. This subsection requires that all attorneys consent to the designation. The appointment of Professor Rudenstine as Referee to hear and report in this case was not made pursuant to SCPA §506(6), but rather pursuant to SCPA § 506(1), which does not require consent of the parties to a reference and permits appointment of a referee by the Surrogate *sua sponte*. Accordingly, all of Petitioner's arguments based upon the provisions of SCPA § 506(6) and its legislative history are totally irrelevant to a court appointment pursuant to SCPA § 506(1).

At page 13 of her Petition, Petitioner also insists that the State of New York does not allow privately paid referees to be appointed without consent in its other courts. This is demonstrably untrue. CPLR Rule 4212 provides, in pertinent part, as follows:

> "Upon the motion of any party as provided in rule 4015 *or on its own initiative*, the court may submit

> any issue of fact required to be decided by the court to an advisory jury or upon a showing of some exceptional condition requiring it *or in matters of account, to a referee to report.*" (Emphasis added.)

Indeed, CPLR § 4317(b) even allows a court, without consent of the parties and on its own motion, to appoint a referee to *determine* a cause of action or an issue requiring the examination of a long account.

Nor is the New York statutory scheme concerning the appointment of referees a recent or unusual one. The use of referees in matters involving lengthy testimony concerning complex factual situations is a traditional method of maximizing judicial resources while protecting the rights of litigants. The precursors to the present New York statutes on this subject were enacted more than 150 years ago, and the current laws were, in part, patterned after Rule 53 of the Federal Rules of Civil Procedure.[2] These provisions codify the inherent power of a court to appoint qualified attorneys to assist it in the accomplishment of its duties. Where, as here, the appointment of a referee is for the purpose of hearing and reporting the findings of the referee on the required matters, rather than hearing and determining them, the ultimate decision is reserved for the court, and the referee's role is a subsidiary one. SCPA § 506(4), applicable here, specifies that the court may confirm or reject in whole or in part the report of the referee. In fact, the Surrogate did not

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[2] In *McGraw-Edison Co. v. Central Transformer Corp.*, 308 F. 2d 70 (8th Cir. 1962), a litigant asserted denial of due process arising out of the use of a special master pursuant to Rule 53(a). The court held that the unnecessary appointment of a special master may amount to a denial of due process, but quoted from *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) for the proposition that an appraisal of the totality of facts in a given case is the appropriate test of whether due process has been denied. The court held that there had been no denial of due process.

accept some of the findings of the referee, thus proving that she had properly exercised her discretion in evaluating the report.

The sole case cited by Petitioner as authority for her contention that New York does not permit judges to appoint private attorneys as referees without the consent of all parties, *Ploski v. Riverwood Owners Corp.*, 255 A.D.2d 24, 688 N.Y.S.2d 627 (2nd Dept. 1999), made no such broad statement of prohibition. It dealt only with the appointment of referees to supervise disclosure pursuant to CPLR §3104(b), and held that the statutory language specifically required that the parties stipulate to the name of a private attorney to act as referee to supervise disclosure. The statute involved in the *Ploski* case has no effect on the ability of judges to appoint private attorneys as referees in other contexts, pursuant to other statutes or their inherent powers.

Petitioner's allegations concerning the purportedly "clandestine" payment of fees to the Referee by The Bank of New York are similarly unfounded. In fact, there was nothing clandestine about it. After devoting nearly 500 hours to this matter over a period of months, the Referee applied to the Surrogate, *on notice to all parties, including Petitioner*, for an award of interim fees.[3] The motion was unopposed, and by an Order dated June 19, 1995, the Surrogate awarded interim fees in an amount somewhat lower than that requested, again properly exercising her discretion.

The Bank of New York, as successor Executor, arranged to pay the interim fee awarded by the Surrogate. Petitioner complains that this payment was improper because it came before the referee's report was submitted. How-

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[3] Although Petitioner conveniently failed to disclose this detail, the motion is reproduced in the Appendix submitted to the New York appellate courts at A4760-A4778.

ever, if the interim fee was not to be paid until after the completion of the report, there would have been no point whatsoever to an award of interim fees. No one disputed that the Referee had performed the work described in his motion, but Petitioner now insists that he should have been made to wait a further period of time, the duration of which could not then be determined, before payment of the interim fee already awarded by the court could be made.

The cases cited by Petitioner decrying the payment of fees to referees prior to the issuance of the report are all inapposite, because they concern referees soliciting and accepting payments which the courts had not approved. In the case most prominently relied upon by Petitioner, *Robinson v. Ball*, 187 A.D. 799, 176 N.Y.S. 273, 275 (1st Dept. 1919), the court stated that if the parties in that case had entered into a stipulation for interim payment of fees, such payment might have been proper. It is respectfully submitted that where the court itself grants an order fixing the amount of interim fees, upon an unopposed motion on notice, the propriety of the payment of such fees is not questionable. Moreover, the Petitioner's silence in failing to oppose the application for an interim award of referee's fees should be deemed as tacit consent to the application.

In an earlier case cited by the *Robinson* court and by Petitioner, *Hebard v. City of New York*, 137 A.D. 752, 122 N.Y.S. 628, 629 (1st Dept. 1910), the court stated that, ". . . *under ordinary circumstances* a referee's right to fees does not accrue until he has completed the reference and filed or delivered his report." (Emphasis added.) Where a protracted course of hearings and submission of written materials has already taken up nearly 500 hours of the referee's time, for which an interim fee award of over $100,000 is made by the court, and the

end of the process is not yet in sight, ordinary circumstances do not exist.

In another case cited by Petitioner, *National Bank of North America v. New Paltz Growers, Inc.*, 89 A.D. 2d 647, 453 N.Y.S. 2d 124 (3rd Dept. 1982), a referee was appointed in a mortgage foreclosure action. He advised both parties that he would bill them for his services at a rate higher than that permitted under the applicable statute. One party agreed, and the other party moved for the referee's removal. On appeal, the court removed the referee, holding that the moving party had been justified in questioning the impartiality of the referee under those circumstances. Here, on the other hand, there can be no such result, because the fee was not requested on an extrajudicial basis. Instead, it was requested of the court and fixed by the court, without opposition.

Petitioner also makes repeated references to *ex parte* conversations which allegedly took place between the referee and attorneys for some of the parties, insinuating that these purported contacts were wrongful and supported her request that the referee be removed. However, the Rules of the Chief Administrator of the Courts of New York specify that:

> "Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond."[4]

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[4] McKinney's 2001 New York Rules of Court §100.3(B)(6)(a); 22 NYCRR §100.3(B)(6)(a).

Petitioner has not alleged that any of the purported communications of which she complains failed to comply with these provisions. It may be assumed that a referee would be permitted at least as much latitude as a judge in the area of *ex parte* communications.

Petitioner insists that the use of a mechanical transcription system deprived her of important rights and violated New York law. However, the statute she claims was violated, Judiciary Law § 290-a, which limited the use of mechanical transcription systems to cases involving no more than two parties, was enacted after the hearings in this matter were concluded.[5] In addition, and even more importantly, Petitioner does not cite even one instance in which the use of a mechanical transcription system caused any prejudice to her. Certainly, she gives no indication of any such problem that could rise to a level cognizable as a deprivation of due process rights.

Since Petitioner has shown no prejudice from the use of the mechanical transcription system, it is clear that she has also failed to show any prejudice from the exclusion by the referee of the court stenographer that Petitioner wanted to prepare a transcript of the proceedings.

Petitioner insists that she has been deprived of property and her reputation "without . . . obtaining meaningful judicial review." (Petition, p. 20) It appears that Petitioner defines meaningful judicial review as judicial review that upholds her unique factual views and legal theories. In fact, this matter has received a thorough investigation and review by New York courts. The Surrogate's Court determined that Petitioner, as preliminary executor, had grossly mismanaged estate assets, improvidently transferred estate assets to non-operating family businesses, engaged in self dealing and willfully refused

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[5] This section took effect as of April 1, 1995, nearly three months after the hearings in this case were concluded.

to obey court orders. Because of these actions, the court removed her as preliminary executor. The court further found that the Petitioner had ignored her fiduciary responsibilities and had exhibited a total disregard for the interests of the estate beneficiaries, and accordingly denied her commissions and imposed various surcharges, including the legal expenses incurred by the estate and beneficiaries in bringing about Petitioner's removal as preliminary executor. (Petition, pp. 26a to 38a) Through all of the succeeding motions and appeals, the findings and rulings of the Surrogate have been thoroughly reviewed and upheld.

PETITIONER'S DUE PROCESS CLAIMS LACK MERIT

The due process arguments made by Petitioner are based upon cases that are readily distinguishable from the instant situation. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), this Court held that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." (401 U. S. at 377, 91 S. Ct. at 785) That case was a class action brought by welfare recipients to challenge state procedures for commencing litigation which required litigants to pay court fees and service of process fees which were conceded to be beyond the ability of the plaintiffs to pay. This Court held that individuals who sought judicial dissolution of their marriages but were denied access to the courts solely because of an inability to pay such fees had been denied due process.

In the instant case, however, Petitioner has not been excluded from the courts; indeed, she has taken full advantage of her access to the courts to challenge all adverse rulings. There can be no serious doubt that she

has been given a meaningful opportunity to be heard, and that this opportunity was in the form of an established adjudicatory procedure. Petitioner appears to believe that a trial before a Surrogate is the only established adjudicatory procedure. This is patently absurd, since it would exclude such statutorily permitted procedures as the appointment of a referee or a Judicial Hearing Officer to hear and report or hear and determine a matter. Petitioner has not cited a single case in which these procedures were held to be constitutionally impermissible.

Petitioner also cites *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L. Ed. 2d 372 (1971) and *M.L.B. v. S.L.J.*, 519 U.S.102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) for the proposition that the proceedings in this case were inherently lacking in due process. But these were both cases in which indigent litigants who could not afford to pay mandatory fees were deprived of important legal rights. For this reason, they are not relevant to the instant situation, in which all parties had full access to the courts.

Finally, Petitioner cites *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973), in which this Court held that the requirement that persons seeking access to the Bankruptcy Court to discharge debts in bankruptcy pay filing fees had a rational basis and did not deny indigents equal protection of the laws. In so doing, the Court found that a bankruptcy discharge, though important, was not a fundamental right such as those at issue in the *Boddie*, *Mayer* and *M.L.B.* cases.[6]

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[6] In the *Mayer* case, an indigent person convicted of a misdemeanor was unable to afford the fee for a transcript to prosecute an appeal; free transcripts were provided for only in felony cases. In the *M.L.B.* case, the denial of parental rights was at stake, and the appellant was unable to pay the fees to prepare the record for an appeal.

Petitioner contends that her rights were prejudiced because the hearing on her accounting was presided over by a referee, so that the Surrogate who determined the facts had not had the opportunity to observe the demeanor of the witnesses during the hearing. Petitioner also speaks approvingly of the alternative procedure of appointing a Judicial Hearing Officer, a retired judge, as a referee to hear and report. These two positions are irreconcilable; the latter procedure must suffer from the same defect as the former from Petitioner's point of view, since the Surrogate would not have observed any testimony held before a referee, whether the referee was a private attorney or a Judicial Hearing Officer.

Moreover, Petitioner ignores earlier litigation that challenged the appointment of referees to hear and report in New York on due process grounds. That case involved the suspension of a New York attorney pursuant to Judiciary Law §90, which specified that the hearing on the charges of misconduct was to be conducted by a special referee.[7] There, appeals to the New York Court of Appeals were dismissed, and a federal action was commenced. The District Court for the Eastern District of New York dismissed the action, abstaining from interfering in a state attorney discipline matter, and such dismissal was affirmed by this Court, in *Mildner v. Gulotta*, 405 F.Supp. 182 (E.D.N.Y. 1975), *affirmed sub nom. Gerzof v. Gulotta*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976). In a subsequent proceeding for declaratory and injunctive relief against the enforcement of the suspension order on the ground that Judiciary Law §90 was unconstitutional under both the United States

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[7] *In re Gerzof*, 45 A.D.2d 450, 359 N.Y.S.2d 76 (2d Dept. 1974). Motions for leave to appeal in the New York Court of Appeals and for appeal as of right were denied and the appeal was dismissed in *Matter of Gerzof*, 35 N.Y.2d 644, 35 N.Y.2d 855, and 35 N.Y.2d 856.

and New York State Constitutions, the New York court held that attorneys are entitled to due process in disciplinary proceedings, although not to the strict standards imposed in criminal actions.[8]

The state court observed that in the federal case, "Judge Neaher, in what must be ruled dictum, found no merit in the constitutional claims."[9] It then went on to hold as follows:

> "Plaintiff also contends that the Appellate Division, which sat as a trial court, should have heard the witnesses and observed their demeanor before rendering its determination. He claims that the procedures which provided for a determination based upon a transcript and reported findings violated his right to a meaningful hearing. Plaintiff states that the authority for the contention is set forth in Judge Weinstein's dissenting opinion in *Mildner v. Gulotta*, *supra*, 405 F.Supp. at 212, 213. It is important to note that Judge Weinstein relied heavily upon cases involving criminal proceedings in the portion of his opinion which deals with this question. See e.g., *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). Moreover, none of the few civil cases cited by Judge Weinstein holds that proceedings in which a referee to report hears testimony and presents his findings to the court are constitutionally infirm. The procedures followed in attorney disciplinary proceedings are substantially similar to those followed in civil actions when a referee to report is appointed. CPLR § 4320. Plaintiff has not cited nor have I found any

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[8] *Gerzof v. Gulotta*, 87 Misc.2d 768, 775-776, 386 N.Y.S.2d 790, 796 (Sup. Ct. Nassau Co. 1976).

[9] 87 Misc.2d at 770, 386 N.Y.S.2d 793.

authority for the proposition that those procedures are unconstitutional.

. . . .

"Thus, plaintiff was afforded a fair and open hearing and the evidence presented before the referee was reviewed by the ultimate trier of fact. It cannot be concluded that his due process rights were violated by this procedure. See *Javits v. Stevens*, 382 F.Supp. 131 (S.D.N.Y.1974); *Matter of Sarisohn*, [21 N.Y.2d 36, 286 N.Y.S.2d 255, 233 N.E.2d 276 (1967)]; *Emslie v. State Bar of California*, 11 Cal.3d 210, 113 Cal.Rptr. 175, 520 P.2d 991 (1974)."[10]

In addition to her constitutional claims, Petitioner perceives an ethical problem in Professor Rudenstine's service as referee in this matter, based upon his "undisclosed out-of-court professional relationship with Stephen Schulte of Schulte Roth & Zabel . . . a party and adversary of petitioner. . . ." (Petition, p.10) Petitioner supports this serious charge only with an excerpt from the New York Law Journal from September 8, 1995 (after the testimony had been concluded and when the referee was in the final stages of preparing his report) indicating that Mr. Schulte had been elected to the Board of Directors of the Benjamin N. Cardozo School of Law, where Professor Rudenstine is a member of the faculty. There is no allegation or proof of any relationship other than their joint appearance on a listing of members of the faculty and administration of the school. Such a minimal and ambiguous indication of professional contacts clearly fails to rise to the level at which any ethical problem can reasonably be considered to exist.

Petitioner asserts that the New York Appellate Division, First Department, improperly took inconsistent

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[10] 87 Misc.2d at 776-778, 386 N.Y.S.2d at 797-798.

positions in evaluating her decisions as to financing for JMI, a corporation of which the estate was a half owner. A moment's consideration reveals that the positions are not inconsistent at all. The Court held that a $1,250,000 loan made to JMI by Petitioner as preliminary executor out of estate funds in 1989 was improvident, while also criticizing her refusal to seek a $1,000,000 loan for JMI in 1990 (when the corporation was purportedly less financially sound). The difference in the two situations is that the sources for the loan to be sought in the latter instance would have been outside investors willing to knowingly risk their capital on a loan to a troubled company, while the loan made by Petitioner to prop up a failing company *out of estate funds* constituted a wager which a fiduciary is not permitted to make. An executor may simply not gamble with money belonging to the legatees to whom she owes a fiduciary duty.

THE SURCHARGES IMPOSED BY THE SURROGATE WERE LEGALLY AND CONSTITUTIONALLY APPROPRIATE

Petitioner asserts that the award of counsel fees out of her share of the estate for attorneys for other legatees deprived her of due process rights because she contends that she had no notice or hearing before such award was made. She also contends that the efforts of the attorneys for the other legatees did not benefit the estate. These arguments are erroneous in all respects.

The decision of Surrogate Preminger which made the award of fees that Petitioner seeks to challenge amply summarizes this firm's efforts and how they benefitted and enhanced the estate:

> "The attorneys for the beneficiaries have established, however, that the Court underestimated the extent to which their services benefitted this Estate

> in the removal proceeding and in the identification of estate assets. Greene & Zinner, counsel for Claudia Marsh Applebaum [sic.], acted as lead counsel in the removal proceeding. The firm prepared for and presented evidence at the removal proceeding concerning Lefkowitz' alleged mismanagement of the estate. In addition, it appears that Greene & Zinner were responsible for investigating and identifying the estate assets, some of which were ultimately located in Hong Kong. Moreover, they assisted in the management of the estate corporations after Lefkowitz was removed. . . ."[11]

Accordingly, the benefit to the estate from the efforts of the attorneys for the beneficiaries, both in the removal of Petitioner as Preliminary Executrix and in the augmentation of the estate through the discovery of additional assets which the Preliminary Executrix failed to pursue or uncover, was established by a specific finding of fact by the Surrogate. Since a question of fact cannot be presented to this Court, the keystone of Petitioner's arguments on the point is removed and with it, her arguments collapse.

Petitioner opines that the decision below conflicts with governing statutory and case law in charging her share of the estate with the counsel fees for services provided by attorneys to another beneficiary. However, the applicable statute, SCPA § 2110, clearly authorizes such

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[11] New York Law Journal, February 26, 1998 at 27, reproduced at 26a-27a of the Petition. In this decision, Surrogate Preminger modified the Report of the Referee to the extent of awarding counsel fees to Greene & Zinner, P.C. and to Shea & Gould, attorneys for other beneficiaries, out of Petitioner's share of the estate. This was the second occasion that the Petitioner's estate share was charged for attorney's fees because of her unreasonable and vexatious conduct. On the first occasion, the fees of the executor's attorneys were charged against the Petitioner's share.

a charge, and the case law, properly construed, fully supports the decision below.

Petitioner relies on *Matter of Estate of Campbell*, 138 A.D.2d 827, 525 N.Y.S.2d 745 (3rd Dept. 1988) for the proposition that she should now be afforded an opportunity to defend herself against payment of the fees of the attorneys for other beneficiaries out of her share of the estate. That case is clearly distinguishable from this one on that point, but is nonetheless instructive. There, the estate was a simple one, but the administration of it was unusually protracted, resulting in large fees for the estate attorneys and numerous objections to the final accounting of the administrator. The parties stipulated as to specific issues to be considered by the court, including whether the administrator should be surcharged for any of the fees of the estate's attorneys, and whether the *estate* should be directed to pay the attorney's fees of the beneficiaries objecting to the accounting.

The Surrogate's Court imposed a surcharge for a portion of the estate's legal fees, and also imposed a surcharge for the reasonable legal fees and disbursements of the beneficiaries in connection with the trial of the objections to the accounting. On appeal, the Appellate Division ruled that the lower court was empowered to surcharge an administrator for improper actions, and to charge an administrator personally for legal expenses incurred in establishing such wrongdoing.

The court did not find that there was any legal impediment to a surcharge for payment of legal expenses of estate beneficiaries, as the court below had done. However, it stated that if the stipulation of the parties which framed the issues for the court had specifically limited the issue to whether payment should be made by the estate, then the surcharge may have been beyond the scope of the stipulated issue. Since the actual stipulation

was not in the record, the matter was remanded. Here, of course, there was no stipulation limiting the discretion of the Surrogate in evaluating the appropriate remedies, and no reason for Petitioner, who had already been surcharged for the legal expenses of the executor because of her improper actions, to expect that she would not similarly be surcharged for the legal expenses of the other beneficiaries.

Petitioner cites *Matter of Dillon*, 28 N.Y.2d 597, 319 N.Y.S. 2d 850 (1971) and *Matter of Urbach*, 252 A.D.2d 318, 683 N.Y.S.2d 631 (3rd Dept., 1999) for the proposition that a beneficiary's interest in an estate cannot be charged for the counsel fees of another beneficiary under SCPA §2110. However, those cases are readily distinguishable from the present situation. In *Dillon*, the underlying proceeding was one to vacate the probate of a later will. The efforts of counsel did not directly enhance the estate or obtain redress for improper activities by any party. In *Urbach*, the matter concerned frivolous objections to a final accounting. Again, no questions of enhancement of the estate or misdeeds by any party were involved. As specifically stated in *Urbach* (*Id.*, at 633), the Court's decision was based upon the general common law requirement that all parties to a controversy pay their own counsel fees. It was in this context that the Court in *Urbach* relied upon *Dillon*.

The present situation, however, is substantially different. Here, the efforts of the attorneys for the beneficiaries were specifically found by the Surrogate to have benefitted the estate by bringing about the removal of Petitioner as Preliminary Executrix (together with the surcharge of Petitioner for serious misdeeds) and the discovery of additional assets which substantially enhanced the estate. Thus, the instant situation contains factors not present in the *Dillon* and *Urbach* cases: viz , the positive

and substantial benefits to the estate accomplished through the efforts of the attorneys for the beneficiaries, and the wrongdoing of the Petitioner. These factors amply justify the exercise by the Surrogate of the powers granted in SCPA §2110 (2) to "direct payment [of compensation of an attorney] from the estate generally or *from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested.*" (emphasis added.)

It is noteworthy that in the decision awarding the fees of the attorneys for the beneficiaries, the Surrogate specifically directed that: "Such fees shall be charged directly against Lefkowitz' share of the estate pursuant to the July 29, 1997 decision."[12]

The July 29, 1997 decision is also annexed to the Petition, at pp. 28a to 38a. In that decision (Petition, p. 34a), in discussing the award of fees to the executor's counsel, the Surrogate stated as follows:

> "Despite the general rule that a party to a lawsuit cannot require his adversary to pay his legal expenses (*Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 NY2d 1), an errant fiduciary may be surcharged for the legal expenses incurred in establishing his wrongdoing and obtaining recoupment. [citations omitted]. Ms. Lefkowitz's conduct which precipitated the removal proceeding is such a case. Accordingly, the legal fees incurred by counsel to BNY in the removal proceeding shall be charged directly against Ms. Lefkowitz's share of the estate."

Petitioner insists that an award of fees to the attorney for one beneficiary from the estate share of another beneficiary is improper under New York Law. However,

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[12] New York Law Journal, February 6, 1998 at 27, reproduced at p. 27a of Petition.

Estate of Burns, 130 Misc.2d 317, 496 N.Y.S.2d 921 (Surrogate's Court, Broome County, 1985); *affirmed* 126 A.D.2d 809, 510 N.Y.S.2d 732 (Third Dept., 1987) presents a case in which wrongdoing by a party was a factor, and in which the Court awarded counsel fees for the attorney retained by one beneficiary from the estate share of another beneficiary. There, Joseph Burns was over eighty years old and mentally ill at the time his niece obtained a power of attorney from him and caused seven bank accounts comprising his entire estate to be changed to joint tenancy with her or accounts in trust for her. Upon the death of Joseph Burns at age eighty-five, his niece took the position that all assets had passed to her by operation of law and that there was thus no estate to probate. Letters of Administration, C.T.A. were issued to the Commissioner of Finance of Broome County, who commenced a discovery proceeding. The nephew of Joseph Burns was granted the right to intervene in the proceeding, and all of the subject bank accounts were determined to be the property of the estate. The nephew sought allowance for his attorney's fees from the estate or from the share of the niece in that estate.

The Court stated that:

> "The cases interpreting these statutes and their predecessors in the law have held that where legal services have been rendered for the benefit of the estate as a whole resulting in the enlargement of all the distributive shares of all legatees or distributees, reasonable compensation should be granted from the funds of the estate. See *Matter of Lounsberry*, 226 A.D. 291, 234 N.Y.S. 680; *Matter of Bellinger*, 55 A.D.2d 448, 390 N.Y.S.2d 739; *Matter of Smith*, 167 Misc. 95, 3 N.Y.S.2d 503. . . .
>
> ". . . Additionally, simple justice dictates that [the niece] should bear the greater share of the

> financial burden placed upon the estate by her wrongful withholding of assets. Therefore, this Court concludes that the Intervenor-Petitioner's attorney is entitled to be paid from the assets from the estate for his services."[13]

The Court pointed out that although the nephew had been an Intervenor, he was certainly the principal player and mover in the litigation. The Court also stated that, although the niece had contended that the services of the attorney for the Intervenor had duplicated those of the attorney for the Administrator, it was clear that they had worked in concert as a team without duplicating or overlapping in their presentation of the evidence.

The Court went on to state that:

> "The cases that the Respondent cites in her memorandum opposing this petition were generally cases wherein the Court has found the application for allowances has not benefitted the estate. Since our findings here are that the Intervenor-Petitioner has benefitted the Estate, the cases cited are not germane to the issue."[14]

The Court allowed a fee to the attorney for the Intervenor and ordered that it be paid one-half from the general funds of the estate and one-half from the niece's share of the estate.

In the past, Petitioner has insisted that the *Burns* case is distinguishable from the present situation in that there it was a wrongdoing *beneficiary*, while here the wrongdoer was a *fiduciary*. If anything, that distinction should militate even more strongly for the payment of counsel fees to the attorneys for the other beneficiaries out of the

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[13] 130 Misc.2d at 319-320, 496 N.Y.S.2d at 923-924.

[14] 130 Misc.2d at 322, 496 N.Y.S.2d at 925.

Petitioner's share of the estate, since her wrongdoings breached her fiduciary responsibilities toward the beneficiaries in addition to damaging the estate.

Petitioner also insists that the decision below conflicts with *Estate of Bellinger*, 55 A.D.2d 448, 390 N.Y.S.2d 739 (Fourth Dept.,1977), a decision upon which the Surrogate specifically relied in making the award of counsel fees.

In *Bellinger*, the Court quoted from *Matter of Graves*, 197 Misc. 638, 639, 95 N.Y.S.2d 310, 311, in stating the general rule regarding the award of compensation:

> ". . . where legal services have been rendered for the benefit of the estate which result in enlargement of the distributive shares of the estate beneficiaries, reasonable compensation should be granted out of the estate for such services. This is particularly so in a case where, because of *interests of the executors adverse to those of the beneficiaries*, justice may not be done except for the performance of legal services by counsel for the beneficiaries. In such case the personal interests of the executors cause them and their counsel, in effect, to step aside and to permit those whose interests are not inimical to the estate in general to protect the rights of the estate. Even in such case, however, the services rendered must be substantial, and must be directed toward a bona fide issue, and may not be merely nominal in overcoming an obviously erroneous claim by the fiduciary."[15]

The Court stated that the test of whether the estate benefits from the efforts of counsel for the beneficiaries is whether the distributees become entitled to receive

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[15] 55 A.D.2d at 451, 390 N.Y.S.2d at 741; emphasis added by *Bellinger* Court.

greater sums from the estate than might otherwise have resulted without the efforts of those applying for the award of fees.

The *Bellinger* Court found it abundantly clear that the attorneys for the beneficiaries had been more than merely volunteers acting on behalf of their own clients in the case. In fact, the Court found that they had "supplied the kinetic force that moved the bank to action in that they performed a major portion of the necessary work to bring this case to a successful conclusion." [16]

Here, the Surrogate held that Greene & Zinner, P.C. had been the lead counsel in removing Petitioner as the Preliminary Executrix and had been responsible for uncovering assets which were subsequently folded into the estate, and that Shea & Gould had actively participated in the removal of the Petitioner. Thus, the *Bellinger* case fully supports the award of fees to these firms from Petitioner's share of the estate.

The other issues raised by Petitioner with respect to the award of counsel fees are completely without merit. That is, the Petitioner asserts that the award of fees out of her share of the estate deprives her of property without due process of law because she claims that the cause of action upon which relief was granted was different from that originally brought before the Court, and that she was not afforded a hearing. These assertions are completely fallacious.

The cause of action did not change between the pleading and the decision; Greene & Zinner, P.C. sought an award of counsel fees for the services which materially benefitted the estate. The Surrogate exercised her discretion, in light of the demonstrated wrongdoing by the Petitioner, to award such counsel fees from the Peti-

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[16] 55 A.D.2d at 452, 390 N.Y.S.2d at 742.

tioner's share of the estate. There was only one cause of action, and it did not change.

For Petitioner to assert that there was no hearing afforded to her is completely unfathomable in light of the forty-eight sessions of hearings on the application for counsel fees and other issues, in which Petitioner took part. Moreover, the Surrogate's award of the counsel fees out of Petitioner's estate share could not have been a complete surprise to her, since such a request was specifically made by Shea & Gould and a similar award had been made of the fees of the executor's attorneys.

Finally, Petitioner asserts that she should not have been surcharged for the fees of the attorneys for the beneficiaries because the estate was not augmented by their actions, citing *Estate of Heilbronner*, 39 Misc.2d 912, 242 N.Y.S.2d 118 (Surr. Ct. N.Y. Co. 1963). That case held that a mere reduction in fees payable by the estate was not sufficient to justify payment of the fee of the attorney for residuary legatees out of the estate. Accordingly, it is not relevant to the instant situation, in which the Surrogate made a specific finding of fact that the attorneys for the beneficiaries had benefitted the estate by revealing the mismanagement of the estate by Petitioner and by identifying estate assets.[17]

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[17] New York Law Journal, February 6, 1998, p.27, reproduced in the Petition at 26a-27a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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